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IN THE SUPREME COURT OF THE UNITED STATES

EDWARD S. ALAMEIDA, JR., Director of the California Department of Corrections, Petitioner

v.

JAMES EDWARD SMITH, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court equitably toll the one-year limitations period applicable to habeas corpus actions to render a prisoner's *pro se* petition timely when his prior, timely-filed petition was dismissed for failure to exhaust one of seven claims, and the dismissal order misled him by advising that following dismissal he could refile a petition in federal court, when in fact the limitations period had already expired, making it impossible to refile a timely petition?

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In 1992, Respondent James Smith ("Smith") was convicted of burglary and sentenced to 22 years in prison. App. A-2, O-77, O-78.[1/] Smith's burglary conviction was affirmed on direct appeal, and the California Supreme Court denied review on November 2, 1994. App. A-2, O-78.

On March 7, 1996, one and a half months before the Antiterrorism and Effective Death Penalty Act ("AEDPA") was enacted, Smith filed his first federal habeas corpus petition. App. A-2, O-76. The State moved to dismiss the petition for failure to exhaust state remedies. App. O-77. A magistrate judge issued a report and recommendation dismissing the petition without prejudice on the ground that five of the seven claims asserted in the petition had not been

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1/ "App." refers to the Appendix submitted by Petitioner.

presented in state court and therefore were unexhausted. App. A-3, O-81. The magistrate's order instructed Smith that:

> [F]ollowing dismissal, petitioner will have the option of either: (1) resubmitting his habeas petition with only his exhausted claims **(which would risk forfeiture of his unexhausted claims under Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts)**; or (2) exhausting his state remedies with respect to the unexhausted claims and then filing a new petition that contains all of the claims raised in the present petition.

App. O-82, O-83 (emphasis in original.) Although the order notified Smith in bold print of the risk of choosing option (1), it was silent with regard to the risks of following option (2), including that AEDPA's new one-year statute of limitations applied and might expire before he refiled a federal petition. On June 13, 1996, the District Court adopted the report and recommendation and dismissed the petition without prejudice. App. F-46, M, N.

Less than one month later, Smith filed a habeas corpus petition in the California Supreme Court to exhaust his claims. App. F-46. After that petition was denied, Smith filed a second federal petition on February 4, 1997. App. A-3, I-56. At that time, about six and a half months remained in AEDPA's one-year limitations period, taking into account tolling under 28 U.S.C. § 2244(d)(2) for the time Smith had a state petition pending.

The State again filed a motion to dismiss the petition for failure to exhaust state remedies. App. I-56. On September 30, 1997, a magistrate filed a report and recommendation dismissing the petition without prejudice on the ground that one of Smith's seven claims was unexhausted. App. I-61. Like the prior ruling, the order advised Smith that:

> Following dismissal, petitioner will have the option of: (1) submitting to this court a new habeas petition that does not contain

> any unexhausted claims (*which would risk forfeiture of these claims under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts*); or (2) exhausting his state remedies and then submitting to this court a petition which contains all of the claims raised in the present proceeding.

App. A-7, I-63 (emphasis in original.) On November 3, 1997, the district court adopted the recommendation and dismissed the petition without prejudice. App. A-3, G-52, H-54.

Although the dismissal order informed Smith that the dismissal was "without prejudice" to refiling a petition in federal court, in fact by then the statute of limitations had already expired; the statute ran about three months earlier while the State's motion to dismiss was pending. App. A-3, A-4. Smith was unaware of this fact and the court did not inform him of it. App. A-6, A-7. Because the statute of limitations had expired, and the court did not give Smith the opportunity before dismissal of withdrawing his sole remaining unexhausted claim and proceeding with his six exhausted claims, both options the court presented to Smith were illusory: by then it was impossible for Smith to refile a timely petition, even if he filed it the same day as the dismissal order. App. A-7.

Smith followed the second option given by the court, exhausted his one remaining claim in state court, and refiled a federal petition asserting all seven of his claims. App. A-5. The State moved to dismiss the petition on statute of limitations grounds, and the court dismissed the petition with prejudice as untimely. App. A-5, C, D, E, F.

Throughout the proceedings in the district court, Smith represented himself *pro se*. He requested but was denied counsel. App. A-3.

REASONS FOR DENYING THE WRIT

The State's petition is a poor candidate for certiorari. The decision it asks this Court to review involves a routine and fact-specific application of settled equitable tolling principles. The Court of Appeals held that Smith was entitled to equitable tolling because the district court erroneously dismissed his earlier, timely habeas petition without first giving him the opportunity -- guaranteed by this Court's case law -- to file an amended petition containing solely his exhausted claims as an alternative to dismissal. The district court misled Smith by advising him that following dismissal, he could refile a federal petition after exhausting state remedies. In fact, the statute of limitations had expired months before the dismissal order, while Smith's petition and the State's motion to dismiss for failure to exhaust were pending, making it impossible for Smith to refile a timely petition. The Court of Appeals reviewed the record and concluded that equitable tolling was warranted. Its decision is consistent with this Court's jurisprudence, and with the conclusion of nine other Circuit Courts of Appeals that equitable tolling is available under AEDPA in actions challenging state judgments. Since the Court of Appeals applied the proper legal standards, the State's petition boils down to the claim that Smith should not have received equitable tolling under the particular facts of this case. The decision does not present a compelling reason or important matter for review.

ARGUMENT

I.

THE PETITION SHOULD NOT BE HELD PENDING THE FINAL DISPOSITION OF *PLILER v. FORD*, BECAUSE *FORD* AND THE CASE AT BAR REST ON FUNDAMENTALLY DISTINCT LEGAL AND FACTUAL GROUNDS

The State contends that the Court of Appeals' decision poses two questions for review:

> 1. Is dismissing a mixed petition under *Rose v. Lundy* improper unless the district court first offers to stay the federal proceedings pending exhaustion of state remedies and advises that the period of limitation would bar a future petition?
>
> 2. May the period of limitation be equitably tolled if a district court dismissed a prior mixed petition after the period expired without advising the habeas petitioner of the option to delete an unexhausted claim as an alternative to dismissal, without offering to stay the petition pending exhaustion, and without advising that the period would bar a future petition?

Petition at i. The State has filed certiorari petitions in several other cases asserting the same questions for review, and the text of the State's various petitions "mirrors" one another. *Id.* at 1-2, 7 n.3 (*citing Pliler v. Ford*, No. 03-221, *Adams v. Brambles*, No. 03-357, and *Pliler v. Hunt*, No. 03-520). The State "suggests" that if "the Court grants one or more of the petitions for writ of certiorari in *Pliler v. Ford*, *Adams v. Brambles*, and/or *Pliler v. Hunt* . . . this petition should be held pending the final disposition of those cases, and should then be disposed of as appropriate." *Id.* at 2.

On January 9, 2004, the Court granted certiorari in *Pliler v. Ford* on two questions:

> 1. Whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies

and advises the petitioner with respect to the statute of limitations in the event of any refiling?

2. Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending?

124 S. Ct. 981 (mem.).

The Court should decline the State's suggestion to hold its petition in the case at bar pending the final disposition of *Ford*. As shown in section II, below, the Court should deny the petition because the Court of Appeals' decision does not present a compelling reason or important matter for review, but instead, is a routine and fact-specific application of settled equitable tolling principles. S. Ct. Rule 10. There is no reason to hold the petition because although *Ford* and the case at bar are similar in some respects, they rest on distinct factual and legal grounds. The petition here can, and should, be denied regardless of the outcome in *Ford*.

The case at bar is an equitable tolling case. The Court of Appeals "h[e]ld that Smith is entitled to equitable tolling because the district court erroneously dismissed his earlier, timely habeas petition without first giving him an opportunity to file an amended petition as an alternative to dismissal." App. A-2. This opportunity is guaranteed to petitioners by *Rose v. Lundy*, 455 U.S. 509, 510, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), and numerous Circuit cases applying *Rose*. *See, e.g., Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001) (holding "that any time in excess of AEDPA's limitation period should be equitably tolled because the district court committed prejudicial legal error when it dismissed Tillema's first federal habeas petition without affording him the opportunity to abandon his sole unexhausted claim as an alternative to suffering dismissal"); *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir. 2000) ("'a federal habeas

petitioner has a right to amend a mixed petition to delete unexhausted claims as an alternative to suffering a dismissal'"); *James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000) (same). The Court of Appeals' decision assessed the facts relevant to any equitable tolling analysis, including, significantly, that the dismissal order misled Smith by assuring him that the dismissal was without prejudice to later refiling claims in federal court, when, in fact, by then the statute had run, making it impossible to refile a timely petition.

Although *Ford* and the case at bar both involve district court orders that failed to give petitioners an informed opportunity to decide how to remedy their defective filings, here the error resulted from the court's failure to allow Smith to exercise his options under *Rose* before dismissing his petition, which doomed any subsequent filing as untimely. Unlike *Ford*, the Court of Appeals in the instant matter did not hold that district courts, "when informing a habeas petitioner of his options with respect to a mixed petition, should 'alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already lapsed.'" *Ford v. Hubbard*, 330 F.3d 1086, 1101 (9th Cir. 2003). The district court's error here was in failing to inform Smith that, consistent with *Rose*, he could withdraw his unexhausted claim and remain in federal court.

Unlike *Ford*, the Court of Appeals here did not rest its decision on the "relation back" rule of Fed. R. Civ. P. 15(c). *Ford,* 330 F.3d at 1093, 1104. Rather, the court affirmed the *denial* of Smith's claim that his petition should be deemed timely because it "related back" to the filing of his prior petitions. App. A-5, E-34 to E-39. Although the Court of Appeals ruled that the district court should have considered whether to stay Smith's federal petition pending the exhaustion of state remedies, Smith, unlike the petitioner in *Ford*, did not request a stay.

Ford is a relation back case. Like the case at bar, *Ford* involved a district court's failure to accurately inform a *pro se* petitioner of his options for remedying defects in a mixed petition. However, *Ford* did not base its decision on equitable tolling grounds. Rather, the court decided to

> treat Ford's initial petitions as if the district court had permitted him to dismiss the unexhausted claims and had then granted his stay motions in order to allow him to exhaust his then-unexhausted claims. Applying Rule 15(c) to Ford's current petitions, [the court] further h[e]ld that those claims that were originally included in his initial petitions relate-back and serve to amend the improperly-dismissed claims in his initial petitions. Because Ford's initial habeas petitions were filed within AEDPA's one-year statute of limitations, his amended petitions relate back to that filing date and are therefore timely with respect to the claims included in those initial petitions.

Ford, 330 F.3d at 1104 (footnote omitted).

In a footnote, the *Ford* court stated in dicta: "Although we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." 330 F.3d at 1104 n.15. The dissent noted that Ford did not raise an equitable tolling claim in the district court or on appeal. *Id.* at 1110 (Silverman, J., dissenting). The *Ford* majority did make one equitable tolling ruling: it remanded for the district court's consideration Ford's claim that several of his habeas claims should be deemed timely because he belatedly received legal papers from his attorney. *Id.* at 1105-07. However, this ruling was tangential to the court's main holding under relation back principles. Thus, despite some similarities, *Ford* and *Smith* rest on different legal theories and factual situations.

Neither of the State's "questions presented" accurately describe the issues in the case at bar. The second question is more accurate to the extent that it acknowledges equitable tolling as the legal basis of the court's decision, and suggests that the issue is whether equitable tolling is proper under the facts of this case. The State's first question adds nothing to the second, and appears to reflect a scattershot approach to try to delay the resolution of as many cases as possible in the event that certiorari is granted on any of its petitions. Certiorari has been granted in *Ford*, but the State's petition here should not be held pending the resolution of *Ford*, because, as shown above, *Ford* and *Smith* are distinct cases raising different issues and, as shown below, there is no compelling reason to grant the State's petition.

II.

THE COURT OF APPEALS' DECISION IS A ROUTINE APPLICATION OF SETTLED EQUITABLE TOLLING PRINCIPLES TO THE PARTICULAR FACTS OF SMITH'S CASE, AND DOES NOT CONFLICT WITH THE LAW OF THIS COURT OR OTHER CIRCUITS

The State makes numerous arguments as to why certiorari should be granted. As shown below, none has merit.

A. The Court of Appeals' Decision Is in Harmony with the Conclusion of Nine Other Circuit Courts of Appeals That Equitable Tolling Is Available in Actions Challenging State Court Judgments under AEDPA

The State asserts that "[a]t the outset, there is an important question of whether equitable tolling of the AEDPA's period of limitation ever should be allowed." Petition at 14. The State contends that "this Court's case law compels the conclusion that Congress did not contemplate equitable tolling for AEDPA." *Id.* In fact, at least ten Circuit Courts of Appeals have concluded that, under this Court's case law and the language and legislative history of AEDPA, equitable

tolling is available in cases challenging state court judgments under AEDPA. *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 651-52 (6th Cir. 2002); *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002), *cert. denied*, 538 U.S. 951, 123 S. Ct. 1639, 155 L. Ed. 2d 496 (2003); *Flanders v. Graves*, 299 F.3d 974, 976 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236, 123 S. Ct. 1361, 155 L. Ed. 2d 203 (2003); *Drew v. Department of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237, 123 S. Ct. 1364, 155 L. Ed. 2d 205 (2003); *Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617-19 (3d Cir. 1998); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997); *see also United States v. Cicero*, 214 F.3d 199, 202-03 (D.C. Cir. 2000) (noting that most of the circuits that have considered the question have concluded that equitable tolling is available in challenges to federal convictions brought under 28 U.S.C. § 2255). The First Circuit has at different times assumed that equitable tolling is available or stated that it has not resolved the issue, and it has remanded cases to district court to consider equitable tolling claims. *See, e.g., David v. Hall*, 318 F.3d 343, 346 (1st Cir.), *cert. denied*, 124 S. Ct. 66, 157 L. Ed. 2d 30 (2003); *Neverson v. Bissonnette*, 261 F.3d 120, 127 (1st Cir. 2001).

In a footnote, the State concedes this overwhelming consensus in favor of equitable tolling, stating that "*[s]ome* circuits have decided that the AEDPA's period of limitation can be equitably tolled," and then listing opinions from *eight* different circuits reaching this conclusion. Petition at 18 n.6 (emphasis added).

The Courts of Appeals are correct to conclude that AEDPA's statute of limitations is subject to equitable tolling, and contrary to the State's assertion, that conclusion is consistent with this Court's jurisprudence. As Judge Kozinski reasoned in the first Court of Appeals case to consider the issue, "[e]very relevant signal -- from the Act's plain language, to its legislative history, to its structure -- points in the same direction: [AEDPA's] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar." *Beeler*, 128 F.3d at 1289.

Beeler noted this Court's teaching that statutes of limitations are presumptively subject to equitable tolling. *Beeler*, 128 F.3d at 1289 (*citing Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)); *see also Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("[i]t is hornbook law that limitations periods are 'customarily subject to "equitable tolling"' . . . unless tolling would be 'inconsistent with the text of the relevant statute'"; "Congress must be presumed to draft limitations periods in light of this background principle.").

Applying this Court's analysis in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), *Beeler* observed that AEDPA's limitation provision is "remarkably lucid," is phrased only as a "'period of limitation,'" and "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" 128 F.3d at 1288. "Nor does the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, 'limit jurisdiction to those cases in which there has been a timely filing' in the district court." *Id.* (*citing Zipes*, 455 U.S. at 393). *Beeler* considered that this Court has "repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to

tolling." *Id.* (*citing Burnett v. New York Cent. R.R.*, 380 U.S. 424, 426, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)).

Beeler noted that "AEDPA's legislative history, were it necessary to consult it, speaks with equally resounding clarity." 128 F.3d at 1288. The court emphasized that neither the conference report, nor any statements of Senators or Representatives, describe the one-year limitation as a restriction on federal court jurisdiction. *Id.* By contrast, many members of Congress, including AEDPA's authors in the Senate and its sponsors in the House, describe it as a "'statute of limitations.'" *Id.*

The court reasoned that a one-year statute of limitations would serve AEDPA's goal of reducing "unacceptable delay" in the federal habeas process "quite well; not as well as a strict jurisdictional bar to be sure, but [the] time-limit will doubtless speed up the habeas process considerably." 128 F.3d at 1288. The court explained that "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Id.*

As the State concedes, other circuits impose similarly strict standards in analyzing equitable tolling. Petition at 18 & n.6; *see also, e.g.*, *Warren*, 219 F.3d at 113 ("Equitable tolling is available when 'extraordinary circumstances' prevent a prisoner from filing a timely habeas petition."); *United States v. Patterson*, 211 F.3d 927, 930-31 (5th Cir. 2000) (per curiam) (stating in § 2255 case that "[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights"); *Harris*, 209 F.3d at 330 (similar).

The equitable tolling standards applied by the lower courts in habeas actions are consistent with, and no more lenient than, the rules used by this Court in examining equitable tolling claims in other contexts. For example, in *Irwin*, the Court explained that it has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96 (footnotes omitted). In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984), the Court indicated that equitable tolling is proper when the plaintiff has received inadequate notice; a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; affirmative misconduct on the part of the defendant lulled the plaintiff into inaction; or the court led the plaintiff to believe that she had done everything required or her.

The development of the case law since *Beeler* confirms the accuracy of its prediction that "district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289; *see Burger*, 317 F.3d at 1141 ("we have limited equitable tolling of the one-year limitations period to 'rare and exceptional' circumstances"); *Harris*, 209 F.3d at 330 ("any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent").

Other Circuits have also engaged in extensive analyses of AEDPA's language and purpose, and have reached the same conclusion as *Beeler*: AEDPA is subject to equitable tolling. *See, e.g., Harris*, 209 F.3d at 329 ("[t]his conclusion is supported by both the language of the AEDPA itself . . . and by its legislative history, which reveals an intent to create a statute

of limitations, not a jurisdictional bar"); *Miller*, 145 F.3d at 617-18 (statutory language, legislative history and statutory purpose compel conclusion that AEDPA's one-year time limitation is a statute of limitations subject to equitable tolling rather than a jurisdictional bar).

The State nevertheless contends that "the Ninth Circuit's conclusion that equitable tolling is available under AEDPA is inconsistent with this Court's rationale in other cases," and cites *United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997), and *Lampf v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). Petition at 15-16. None of these cases casts doubt on the consensus that equitable tolling is available to habeas petitioners under AEDPA.

Beggerly involved a dispute between a private citizen (the plaintiff) and the United States Government over a piece of land on Horn Island in Mississippi. When the government sought to make the entire island into a federal park, it filed actions to quiet title against 200 persons. On the eve of trial, having no evidence that the land in question had ever been granted to a private landowner, Beggerly settled with the federal government, agreeing to the quieting of the land in favor of the government in exchange for two hundred thousand dollars. Many years later, Beggerly finally obtained evidence of a grant predating the federal government's claim, and more than 12 years after judgment was entered in the quiet title action, Beggerly filed suit to set aside the settlement agreement. The Quiet Title Act provides that suits must be brought within 12 years of the date the plaintiff knows or should have known about the claim of the United States. Beggerly, recognizing he had not filed within 12 years, argued he was entitled to equitable tolling

because he had been diligent in trying to find evidence to support his claim to the land. 524 U.S. at 39-43.

This Court held that equitable tolling was not available in an action under the Quiet Title Act. The Court found equitable tolling to be inconsistent with the text of the Quiet Title Act for three interrelated reasons: (1) the limitations period did not begin to run until the plaintiff knew or should have known of the claim of the United States to the land, and thus already effectively allowed for some equitable tolling; (2) the Quiet Title Act had a 12-year or "unusually generous" limitations period; and (3) the Act deals with ownership of land and "[i]t is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U.S. at 49-50.

Beggerly is not a blanket pronouncement about equitable tolling generally. This Court did no more than conduct a detailed analysis of the purposes of the statute under consideration, the length of the limitations period therein, and the practical realities of allowing tolling under the statute.

The Court of Appeals conducted the type of analysis *Beggerly* calls for in *Beeler*. The court examined the structure and legislative history of AEDPA and concluded that there was no indication that equitable tolling did not apply. As the *Beeler* court noted, statutes of limitations are presumptively subject to equitable tolling, and all indications are that "Congress did not intend to upset the normal default rule allowing longer tolling periods." 128 F.3d at 1289. Nine other Circuits have agreed with *Beeler*'s conclusion that equitable tolling is available under AEDPA in § 2254 cases.

In *Harris*, the Fourth Circuit expressly addressed and rejected the argument that *Beggerly* raises any question regarding the availability of equitable tolling in AEDPA cases. 209 F.3d at 329-30. The Fourth Circuit noted that the statute at issue in *Beggerly* served policy interests that would be adversely affected if the limitations provisions were not strictly enforced, a factor it noted was not present in AEDPA cases. *Id.* at 329. The court analyzed the language of AEDPA and found no way to infer congressional intent to limit alternatives to relief from the limitations period. *Id.* at 329-30.

Brockamp, 519 U.S. 347, also cited by the State, was considered and properly distinguished by the *Beeler* court. The court explained:

> In *Brockamp*, the Court held that a time-limit on filing tax refund claims was a jurisdictional bar, not a tollable statute of limitations. The statute at issue there was, however, phrased in "a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions." [117 S. Ct. at 851.] AEDPA's one-year limit is neither detailed nor technical; it reads like an everyday, run-of-the-mill statute of limitations. Moreover, *Brockamp* also relied heavily on the fact that in administering a tax system, it is sometimes necessary "to pay the price of occasional unfairness in individual cases . . . in order to maintain a more workable" regime. [*Id.* at 852.] While such "occasional" injustices may be a necessary price of tax administration, they are decidedly not an acceptable cost of doing business in death penalty cases.

Beeler, 128 F.3d at 1288 n.4; *see also Harris*, 209 F.3d at 329.

Lampf, 501 U.S. 350, the State's final case, does not suggest that equitable tolling is unavailable under AEDPA. The statute in *Lampf* (section 10b of the Securities Exchange Act of 1934) had no statute of limitations at all, and this Court merely was confronted with the task of borrowing appropriate deadlines from similar statutes.

The State argues that equitable tolling is impermissible because AEDPA already contains various express exceptions to the one-year limitations period in § 2244(d)(1) and (2), and therefore Congress purportedly must not have contemplated that the courts would authorize the additional exception of equitable tolling. Petition at 15-16. Section 2244(d)(1)(A)-(D) lists various triggering events for the commencement of the limitations period, and § 2244(d)(2) provides that the limitations period is tolled during the time a properly filed application for State post-conviction relief is pending.

The Courts of Appeals have considered, and properly rejected, this argument. In *Harris*, the Fourth Circuit reasoned that the argument

> reads too much into any negative inference that may reasonably be drawn from the exceptions. The exceptions in § 2244(d)(1)(B)-(D) simply make the writ available to address later arising circumstances, while the exception in § 2244(d)(2) ensures that state post-conviction review will be allowed to proceed on course. Without these exceptions, a petitioner could inappropriately be denied the writ altogether, "risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996). The inclusion of these statutory provisions does not give rise to the inference that the application of the limitation period must otherwise be absolute, as might be the case if the period were jurisdictional.

Harris, 209 F.3d at 329; *see also Beeler*, 128 F.3d at 1289 ("The Supreme Court has cautioned against using this kind of negative inferential reasoning, because such 'excursions into extrapolation of legislative intent' are most often 'entirely unilluminating.'") (*quoting Cort v. Ash*, 422 U.S. 66, 83 n.14, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)); *Dunlap v. United States*, 250 F.3d 1001, 1006-07 (6th Cir. 2001) (rejecting argument in context of § 2255 actions).

B. The Court of Appeals' Decision Properly Granted Equitable Tolling to Protect Smith's Right to Federal Habeas Review Under *Rose v. Lundy* and Other Settled Law

Given the overwhelming consensus among the lower courts that equitable tolling is available under AEDPA, the State's petition boils down to the claim that equitable tolling was simply improperly granted in the case at bar. As the State admits, "[r]esolving equitable tolling is often time-consuming and fact-intensive." Petition at 20; *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (equitable tolling is "a discretionary doctrine that turns on the facts and circumstances of a particular case"); *Warren*, 219 F.3d at 113 ("Equitable tolling is a doctrine that permits courts to extend a statute of limitations on a *case-by-case basis* to prevent inequity.") (emphasis added). The court below properly assessed all of the facts relevant to an equitable tolling determination, and concluded that tolling was proper under the particular facts of Smith's case. The State's contention that the Court of Appeals' conclusion conflicts with this Court's case law is meritless.

The State insists that "[e]ven assuming equitable tolling is available under the AEDPA, the Ninth Circuit's holding that it is justified based on an earlier, mixed petition dismissed after the period expires, contradicts the reasoning in *Duncan v. Walker*, 533 U.S. 167 [121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)], and functionally eviscerates *Duncan*'s holding for the greater amount of timeliness cases dealing with prior federal petitions." Petition at 16-17. Yet elsewhere the State argues that "this Court has not had the opportunity to provide specific guidance on whether equitable tolling . . . is justified when a prior district court dismissed a mixed petition without advising the habeas petitioner of the option of deleting the unexhausted claim as an alternative to dismissal and without offering to stay and abey the petition pending exhaustion of state

remedies." *Id.* at 20-21. In any event, the Court of Appeals' decision is not inconsistent with *Duncan* or any relevant Supreme Court authority.

Granting Smith equitable tolling to render his petition timely was an appropriate and reasonable use of discretion to preserve his right to federal habeas review under *Rose v. Lundy*, 455 U.S. 509. In *Rose*, this Court held that district courts must dismiss "mixed" petitions, i.e., petitions containing both exhausted and unexhausted claims, but must "leav[e] the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510. *Rose* instructed that prisoners who misunderstand the exhaustion requirement "and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims." *Id.* at 520; *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) ("*Rose v. Lundy* held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims. The opinion, however, *contemplated that the prisoner could return to federal court after the requisite exhaustion*.") (emphasis added).

When *Rose* was decided, there was no statute of limitations in habeas cases. As the Ninth Circuit has explained:

> Prior to the advent of AEDPA, dismissal without prejudice to the filing of a new, exhausted petition caused no detriment to the petitioner, because there was no time limitation on the filing of a federal habeas petition. AEDPA's one-year statute of limitations, however, has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court.

Anthony, 236 F.3d at 573; *see also Zarvela v. Artuz*, 254 F.3d 374, 377 (2d Cir. 2001) (*Rose*'s "direction was given before Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions").

In the case at bar, although AEDPA's one-year limitations period applied, "the district court's order suggested that dismissal was only a minor procedural setback":

> Following dismissal, petitioner will have the option of: (1) submitting to this court a new habeas petition that does not contain any unexhausted claims (*which would risk forfeiture of these claims under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts*); or (2) exhausting his state remedies and then submitting to this court a petition which contains all of the claims raised in the present proceeding.

App. A-7 (emphasis in original.) "Because the limitations period had expired *before dismissal*, however," while the State's motion to dismiss was pending, it was impossible for Smith to refile a timely petition *following dismissal*, as the court advised. *Id.* (emphasis added). "The district court's order presented Smith with a Hobson's choice" -- if he followed either suggested option, he would inevitably be barred by the statute of limitations. *Id.* Even if he had elected to forego his one unexhausted claim and refile a federal petition with his six exhausted claims, he would be out of time, because the statute had expired and the court did not give him the opportunity *before dismissal* of remaining in federal court by amending his petition to delete his unexhausted claim. *Id.*

By dismissing his petition without first giving him a chance to withdraw his sole unexhausted claim and remain in federal court, the district court violated *Rose* and Smith's rights under *Rose*. The court compounded the problem by misleadingly stating that the dismissal was

"without prejudice," and that Smith could, "[f]ollowing dismissal," submit a new petition that withdrew the unexhausted claim or exhaust state remedies and refile a new petition. App. A-7, A-8. The Court of Appeals correctly applied equitable tolling to preserve Smith's right under *Rose* to "return to federal court after the requisite exhaustion" and obtain, for the first time, federal court review of the merits of his habeas claims. *Lonchar*, 517 U.S. at 330 ("the interest in permitting federal habeas review of a first petition is quite strong"); *Slack*, 529 U.S. at 487 ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition.").

Quoting *Duncan*, the State argues that allowing equitable tolling in Smith's situation "would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions." Petition at 17. This is not true, because in any habeas case the petitioner must present his claims to state court before he can obtain a ruling on them in federal court. "[T]he objective of *Rose v. Lundy* . . . is to assure that a district court will not grant relief on unexhausted claims . . . ." *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (cited in Petition at 21). The course followed by the Court of Appeals achieves this objective by requiring petitioners to present all of their claims in state court before they can obtain a ruling on the merits in federal court.

Again citing *Duncan*, the State also complains that allowing tolling in Smith's situation "creat[es] more potential for delay in the adjudication of federal law claims." Petition at 17. However, among the factors considered in an equitable tolling analysis is the diligence of the petitioner in pursuing his claims. *See, e.g.*, *Burger*, 317 F.3d at 1141; *York v. Galetka*, 314 F.3d

522, 527-28 (10th Cir. 2003); *see also* cases listed *supra* at 10. Equitable tolling will not be available to petitioners who unreasonably delay in pursuing their claims during the limitations period. *See, e.g., Guillory v. Roe*, 329 F.3d 1015 (9th Cir.) (equitable tolling denied where petitioner filed his first federal petition two days before statute expired and waited over two years to exhaust claims after federal court dismissal for failure to exhaust), *cert. denied sub nom. Guillory v. Yarborough*, 124 S. Ct. 449, 157 L. Ed. 2d 324 (2003); *Malcolm v. Payne*, 281 F.3d 951 (9th Cir. 2002) (equitable tolling denied where petitioner took 13 months after federal dismissal for failure to exhaust state remedies to file state exhaustion petition).

1. The Court of Appeals' Decision Is Consistent with *Duncan v. Walker* and with Circuit Court Cases Interpreting *Duncan*

Contrary to the State's assertions, the Court of Appeals' decision is entirely consistent with *Duncan*. *Duncan* held that a federal habeas corpus petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), and therefore AEDPA's one-year limitations period is not tolled during the time a federal petition is pending. 533 U.S. at 181-82. The *Duncan* majority stated that it had no occasion to address the question of the availability of equitable tolling in light of the facts that the petitioner had more than nine months remaining in the limitations period when the district court dismissed his petition without prejudice because it was not clear he had exhausted state remedies; and the petitioner never returned to state court, but instead filed another federal petition about 10 months later, asserting claims different from those presented in his initial filing. *Id.* at 170, 181. The petition was dismissed as untimely. *Id.*

In an opinion concurring in part and concurring in the judgment, Justice Stevens, joined by Justice Souter, made "two observations regarding the equitable powers of the federal courts" to avoid the harsh consequences of the one-year statute and preserve federal review, powers that remain unaffected by the majority's "limited holding." 533 U.S. at 182-84. First, Justice Stevens encouraged district courts confronted with mixed petitions to retain jurisdiction and stay the federal habeas proceeding pending the exhaustion of state remedies. *Id.* at 182-83.

Second, Justice Stevens emphasized that federal courts may equitably toll the limitations period in appropriate cases. 533 U.S. at 183. After *Duncan*, "a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Id.* Moreover, "federal courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted." *Id.* at 183-84 (footnote omitted). In such cases, equitable tolling during the pendency of unexhausted federal petitions may be appropriate and is not precluded by the majority's limited holding. *Id.* at 184 & n.3.

Justice Stevens further noted that district courts on average take 268 days to dismiss petitions on procedural grounds, leaving petitioners with little time to exhaust state remedies and refile a federal petition. 533 U.S. at 184; *see also id.* at 186 (Breyer, J., dissenting). Justice Stevens explained that "[t]he question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas

corpus law . . . but also for district courts." *Id.* at 184 n.2; *see also id.* at 191 (Breyer, J., dissenting).

The Court of Appeals' decision granting equitable tolling is consistent with the concurring opinion in *Duncan*, and does not conflict with the majority opinion. Smith "invoke[d] the [federal] court's jurisdiction within the 1-year interval prescribed by AEDPA." 533 U.S. at 183. He filed his first federal petition before AEDPA was enacted, less than 14 months after the conclusion of direct review. Unlike the habeas petitioner in *Duncan*, after his first federal petition was dismissed for failure to exhaust state remedies, Smith promptly (within one month) filed a petition in state court to exhaust claims. Also in contrast to the habeas petitioner in *Duncan*, after his state petition was denied, Smith refiled a federal petition within the one-year limitations period, with six and a half months remaining in the period. The statute of limitations nevertheless expired while Smith's timely-filed second petition was pending.

On similar facts, the Tenth Circuit granted equitable tolling in *York*, 314 F.3d 522. The court explained that "York's timeliness problem is that the one-year limitations period was not tolled during the time his second federal habeas petition was pending." *Id.* at 527. The district court dismissed the second petition for failure to exhaust state remedies, and when York returned to federal court to refile a petition after exhaustion, the petition was time-barred. *Id.* at 527-28. The court noted that

> [i]n *Duncan* . . . the very case that created the 'no tolling' rule for prior federal habeas petitions, concurring justices of the Supreme Court recognized that the rule might pose problems for petitioners, like York, whose prior petitions had been dismissed in order to exhaust state remedies. . . . These justices suggested that a federal court might apply equitable tolling to relieve a petitioner of the consequences of the rule.

Id. at 527. The court concluded that the district court should have applied equitable tolling to render York's third petition timely, and remanded the case for consideration of the merits of the petition. *Id.* at 528.

The case at bar is an even stronger case for tolling than *York*, because when York's second petition was dismissed for failure to exhaust, he still had 11 days remaining in the limitations period to try to exhaust his claims and return to federal court. 314 F.3d. at 526. Here, by contrast, the statute had run months before the court dismissed Smith's petition, making it impossible for him to refile a timely petition.

The Court of Appeals' conclusion that the district court erred by not considering the alternative of staying the petition to allow Smith to exhaust state remedies is also consistent with the concurring opinion in *Duncan* and the law in other circuits. For example, in *Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69 (1st Cir. 2002), the First Circuit held that the district court abused its discretion by dismissing a habeas petition rather than retaining jurisdiction and entering a stay pending the outcome of state exhaustion proceedings. In reaching its decision, the First Circuit emphasized the importance of federal courts retaining jurisdiction of habeas petitions when there is a risk that the statute of limitations might run before the petitioner can exhaust state remedies and refile a federal petition. The court explained:

> When *Rose* was decided, there was no time limit on petitions filed under § 2254. Thus, there was little cost to a dismissal without prejudice -- the state prisoner could refile the petition at any time following exhaustion of his federal claims. AEDPA changed matters. Its one-year statute of limitations "has rendered outright dismissal perilous to some litigants, because petitioners . . . may find themselves time-barred when they attempt to resubmit their exhausted claims to the district court." *Anthony v. Cambra*, 236 F.3d 568, 573 (9th Cir. 2000). Recognizing the risks attendant to dismissal in the post-AEDPA world, several

> courts have concluded that a stay is "the right step to take" in cases involving mixed petitions.

Id. at 79.

The court recognized that "there is a growing consensus that a stay is *required* when dismissal could jeopardize the petitioner's ability to obtain federal review." 299 F.3d at 79 (original emphasis) (citing *Zarvela*, 254 F.3d at 380 (a stay "will be the only appropriate course" where outright dismissal could jeopardize the timeliness of any subsequent petition); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000) ("dismissal is not proper when that step could jeopardize the timeliness of a collateral attack"); and *Delaney v. Matesanz*, 264 F.3d 7, 13, n.5 (1st Cir. 2001) (recommending stays "in instances in which the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely")).

At least ten Circuits have recognized that district courts have the discretion to stay a federal habeas action to allow the petitioner to exhaust state remedies. *See, e.g., Lee v. Norris*, ___ F.3d ___, No. 03-1978EA, 2004 WL 57413 (8th Cir. Jan. 14, 2004) (stay proper to allow exhaustion where limitations period would run if petition were dismissed); *Merritt v. Blaine*, 326 F.3d 157, 170 n.10 (3d Cir.), *cert. denied*, 124 S. Ct. 317, 157 L. Ed. 2d 219 (2003); *Thompson v. Secretary for Dep't of Corrections*, 320 F.3d 1228, 1229 & n.3 (11th Cir. 2003) (per curiam), *cert. petition filed*, Aug. 1, 2003, No. 03-6245; *Griffin*, 308 F.3d at 652 & n.1 (following *Duncan* concurrence and endorsing stays to avoid limitations problems); *Evans v. Smith*, 220 F.3d 306, 321-22 (4th Cir. 2000); *McGary v. Scott*, 27 F.3d 181, 185 (5th Cir. 1994) (pre-AEDPA case); *see also* cases cited in the preceding paragraph.

2. Smith's Detrimental Reliance on Misleading Court Orders Justifies Equitable Tolling

The State's petition tries to brush aside a key fact warranting equitable tolling: that the court mislead Smith by stating that its dismissal was "without prejudice" and advising him that "following dismissal" he could refile a federal petition when, in fact, after dismissal it was impossible to file a timely petition.

It is settled law that a party's reliance on a court order or on the statements or conduct of a judge may warrant tolling. This principle is so firmly established that this Court has held that such reliance justifies extensions of jurisdictional bars, such as the time to file a notice of appeal. *Thompson v. I.N.S.*, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404 (1964) (per curiam) (late-filed notice of appeal deemed timely when date selected for filing notice was made in reliance on district court's incorrect statement that new trial motion was filed "in ample time"); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S. Ct. 283, 9 L. Ed. 2d 261 (1962) (per curiam) (late-filed notice of appeal deemed timely when time for filing notice was based on district court's order, later reversed by court of appeal, that deadline was extended because of excusable neglect). The Ninth Circuit summarized this line of authority in *Hernandez-Rivera v. I.N.S.*, 630 F.2d 1352, 1355 (9th Cir. 1980):

> [i]n each case, counsel for the appellant was lulled into the false sense of security that he could delay filing the notice of appeal until after the time prescribed by the applicable rules because of the extension of time granted by the court. In each case, the appellant was misled by the words or conduct of the trial court into believing that the time for appeal was extended beyond that prescribed by the applicable rules. . . . [W]here there has been official misleading as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits.

630 F.2d at 1355.

The misleading orders given to Smith are particularly egregious in light of the duty of the courts "to take appropriate measures to permit the adjudication of *pro se* claims on the merits, rather than to order their dismissal on technical grounds." *Donald v. Cook Co. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996); *see also Castro v. United States*, 124 S. Ct. 786 (2003) (before courts recharacterize *pro se* pleading as § 2255 motion, they must provide detailed information and warnings to the prisoner about the consequences of such recharacterization under AEDPA); *Slack*, 529 U.S. at 487 ("the complete exhaustion rule is not to 'trap the unwary *pro se* prisoner'"); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (*pro se* complaints are held "to less stringent standards than formal pleadings drafted by lawyers").

The propriety of granting equitable tolling under AEDPA when courts misled *pro se* petitioners is illustrated by *United States v. Patterson*, 211 F.3d 927. In *Patterson*, a *pro se* prisoner timely filed a § 2255 motion. 211 F.3d at 928. He moved to voluntarily withdraw the motion without prejudice "'so that he could find an experience[d] writ-writer '" and refile his motion at "'a later date.'" *Id.* The district court granted the request and dismissed the § 2255 motion without prejudice.

When Patterson refiled his § 2255 motion nearly a year later, it was dismissed as untimely. 211 F.3d at 930. The Fifth Circuit granted equitable tolling to render the late-filed motion timely. The court explained, in reasoning equally applicable here:

> At the time Patterson moved to dismiss his petition, he and the district court apparently were under the mistaken impression that he would not be time-barred from filing another § 2255 motion . . . . [P]atterson relied to his detriment on the district court's granting of his request to dismiss the initial, timely filed

> § 2255 motion in order to refile it at a later date. The declared reason for Patterson's request to withdraw the initial § 2255 motion was to file another (with the assistance of a writ-writer) at a later date. However, on the very date that the district court dismissed Patterson's initial § 2255 motion (over the government's objections), April 30, 1997, any future filings would have been time-barred . . . .
>
> We are persuaded that these circumstances are sufficiently rare and extraordinary to warrant equitable tolling . . . .

Id. at 931-32; *see also Baldwin County Welcome Center*, 466 U.S. at 151 (equitable tolling proper where court led plaintiff to believe she had done everything required of her).

3. Smith Diligently Pursued His Rights

The State also argues that Smith "demonstrated a lack of diligence [that is] inconsistent with [receiving] equitable tolling." Petition at 19-20. However, the Court of Appeals reviewed the entire record and concluded that Smith was diligent. The court's conclusion is correct and does not conflict with this Court's jurisprudence.

The Court of Appeals noted that Smith "attempted to exhaust all seven of his claims before filing his second petition . . . and, at the very least, exhausted six out of seven of his claims pressed in his second petition." App. A-11, A-12. The court emphasized that "[t]he fact of a *mixed* petition requires considering the body of law concerning dismissal of mixed petitions, and *reflects the diligence of the petitioner*." App. A-12 (first emphasis in original; second emphasis added).

The opinion recounts numerous other facts attesting to Smith's diligence, including that he filed his first petition before AEDPA was enacted, and that he filed his second petition with more than six months remaining in the limitations period, only to have the statute run while his

petition was pending. App. A-2, A-3. The operative petition was timely filed, not by one or two days, as in some cases granting equitable tolling, but by over six months.

The State emphasizes the time Smith took returning to federal court after his second petition was dismissed in November 1997. Petition at 23. By then, however, the statute had already run and there was nothing Smith could do to file a timely petition. In examining a petitioner's diligence, the relevant inquiry is whether the petitioner was diligent while the statute was running. *Irwin*, 498 U.S. at 96 ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading *during the statutory period*"; "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in *preserving his legal rights*") (emphases added); *Brackett v. United States*, 270 F.3d 60, 71 (1st Cir. 2001) (equitable tolling candidate must act with "'reasonable diligence throughout *the period he seeks to toll*'") (emphasis added), *cert. denied*, 535 U.S. 1003, 122 S. Ct. 1575, 152 L. Ed. 2d 495 (2002); *Green v. United States*, 260 F.3d 78, 82 (2d Cir. 2001) (same). Unquestionably, Smith was diligent while the statute was running -- he filed his second petition with over six months remaining in the limitations period, and the court erroneously dismissed it three months after the statute ran.

The State complains that Smith did not file his third federal petition until about two and a half months after the state court denied his exhaustion petition. Petition at 23; App. A-4, A-5. However, at all times relevant here, California Supreme Court denials of habeas petitions did not become final until 30 days after issuance of the denial order. *Allen v. Lewis*, 295 F.3d 1046 (9th Cir. 2002) (en banc). Smith returned to federal court about a month and a half after the state court dismissal became final. That he took more than 30 days to return to federal court does not

make his conduct unreasonable, and comes nowhere near the amount of time courts have found unreasonable in other cases. *See, e.g., Guillory*, 329 F.3d 1015 (equitable tolling denied where petitioner took seven months to refile federal petition after state court denied exhaustion petition); *Malcolm*, 281 F.3d 951 (equitable tolling denied where petitioner took 13 months after federal dismissal to file state exhaustion petition). Viewing Smith's conduct as a whole, and particularly when the statute was running, he acted with reasonable diligence.

CONCLUSION

For the foregoing reasons, the Court should deny the State's petition. Further, the Court should not hold the petition pending the final disposition of *Ford*.

Dated: February 4, 2004

Respectfully submitted,

MARIA E. STRATTON
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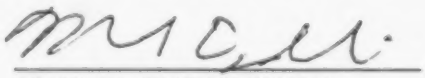

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